TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 308.

THE PAGE COMPANY, PLAINTIFF IN ERROR,

vs.

LUCY MAUD MONTGOMERY MACDONALD, &c., A RESIDENT OF THE PROVINCE OF OTTAWA IN THE DOMINION OF CANADA AND A BRITISH SUBJECT NOW COMMORANT IN THE DISTRICT OF MASSACHUSETTS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED MARCH 22, 1922.

(28,776)

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INDEX.

UDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 29, 1922.

District Court of the United States, District of Massachusetts.

No. 1333. Law.

THE PAGE COMPANY

v.

L. M. MONTGOMERY MACDONALD.

Order of Enlargement of Time for Docketing Case and Filing Record.

March 14, 1922.

For good cause shown, it is ordered that the time for docketing this case and filing the record thereof in the Supreme Court of the United States be enlarged to and including Wednesday, March 22, 1922.

J. M. MORTON, JR.,
U. S. District Judge.

2 [Endorsed:] #1333. Law. The Page Company v. Lucy Maud Montgomery Macdonald. Order of Enlargement of Time. United States District Court, Mass. Dist. Filed in Clerk's Office Mar. 14, 1922.

3 & 4 District Court of the United States, District of Massachusetts.

No. 1333. Law.

THE PAGE COMPANY, Plaintiff,

v.

LUCY MAUD MONTGOMERY MACDONALD, Defendant.

Writ of Error and Return of District Court Thereon.

5 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between The Page Company, a corporation organized and existing under the laws of the Commonwealth of Massachusetts, hav-

ing its principal place of business in Boston, in said Commonwealth, and a resident and citizen thereof, plaintiff, and Lucy Maud Montgomery Macdonald, otherwise called Lucy Maud Macdonald, otherwise called L. M. Montgomery, a resident of the Province of Ottawa in the Dominion of Canada, and a British subject, now commorant in the District of Massachusetts, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, D. C., on the 15th day of March next, in the said Supreme Court of the United States, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the thirteenth day of February, in the year of our Lord one thousand nine hundred and twenty two.

JAMES S. ALLEN,
Clerk of the District Court of the United States,
District of Massachusetts.

Allowed by
J. M. MORTON, Jr.,
U. S. District Judge.

6 *Return of District Court on Writ of Error.*

DISTRICT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now, here, the Judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I James S. Allen, Clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said Court this eighteenth day of March A. D. 1922.

[Seal of the United States District Court, Massachusetts]

JAMES S. ALLEN,
Clerk.

7 *Transcript of Record of District Court.*

UNITED STATES OF AMERICA.
District of Massachusetts, ss:

At a District Court of the United States begun and holden at Boston, within and for the District of Massachusetts, on the first Tuesday of December, being the seventh day of December, in the year of our Lord one thousand nine hundred and twenty one.

Before The Honorable James M. Morton, Jr., District Judge.

No. 1333, Law Docket.

THE PAGE COMPANY, Plaintiff,

v.

LUCY MAUD MONTGOMERY MACDONALD, Defendant.

Writ.

MASSACHUSETTS DISTRICT, *ss:*

[L. S.]

The President of the United States of America to the Marshal of our District of Massachusetts or his Deputy, Greeting:

We command you to attach the goods or estate of Lucy Maud Montgomery Macdonald, otherwise called Lucy Maud Macdonald, otherwise called L. M. Montgomery, a resident of the Province of Ottawa in the Dominion of Canada, and a British subject, now commorant in our District of Massachusetts, to the value of twenty five thousand dollars, and summon said defendant (if she may be found in your District) to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the second Tuesday of September next. Then and there, 8 in our said Court, to answer unto The Page Company, a corporation organized and existing under the laws of the Commonwealth of Massachusetts, having its principal place of business in Boston in said Commonwealth, and a resident and citizen thereof. In an action of Tort; to the damage of the said plaintiff (as it says) the sum of twenty five thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness, The Honorable James M. Morton, Jr., at Boston, the twenty first day of June, in the year of our Lord one thousand nine hundred and twenty.

ARTHUR M. BROWN,
Deputy Clerk.

Officer's Return on Writ.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Boston, June 22nd, 1920.

Pursuant hereunto I have this day attached a chip as the prop
erty of the within named Lucy Maud Montgomery Macdonald, an
thereafter on the same day I summoned her to appear at court an
answer as within commanded, by delivering to her an original sum
mons of this writ, in hand at said Boston.

PATRICK J. DUANE,
U. S. Marshal,
By CHARLES A. BANCROFT,
Deputy.

The writ in this cause was duly entered at the September Term o
this Court, A. D. 1920, when the plaintiff appeared by Asa P
French, its attorney. On the 27th day of September, A. D. 192
appeared Weld A. Rollins specially, as attorney for defendant.
At the entry of this cause, to wit, September 15, 1920, the follow
ing Declaration was filed:

Plaintiff's Declaration.

(Filed September 15, 1920.)

And the plaintiff says that it is a publisher and the defendant i
an author, and that on or about the first day of May, 1920, the de
fendant published a certain false and malicious libel concerning
the plaintiff in a certain bill of complaint filed in the Superior Cour
for the County of Suffolk and Commonwealth of Massachusetts
in a suit in equity entitled "L. M. Montgomery Macdonald versu
The Page Company and the C. H. Simonds Company," and num
bered 17598 Equity on the docket of said court, namely—

9 "The plaintiff (meaning this defendant) alleges on in
formation and belief, however, that L. C. Page & Company
(Inc.) (meaning the predecessor of this plaintiff) before returning
said manuscripts (meaning manuscripts sent to it by this defendan
for examination and selection) secretly made copies of the stories
and kept the said copies for its own purposes. These copies, when
the company was reincorporated as The Page Company, were turned
over to The Page Company and have been in its possession ever
since * * *. It was, therefore, improper on the part of L. C
Page & Company (Inc.), and against equity and good conscience
for it secretly to copy and keep the plaintiff's literary productions
The plaintiff alleges on information and belief that the purposes o
L. C Page & Company (Inc.) in thus secretly copying, and The
Page Company in preserving, her manuscript was to make some

unjust gain for itself, either by getting the stories and escaping the payment of royalty to the plaintiff, or by getting an unfair advantage over her in the dealings which might come about in the future, or which were then going on with respect to the plaintiff's other books * * *. The Page Company, therefore, while the negotiations for settlement of the suit were pending, bethought itself of the old copies of her (meaning this defendant's) rejected stories which it had on hand, of which fact, however, the plaintiff (meaning this defendant) was in entire ignorance. The Page Company thereupon injected into the negotiations (meaning negotiations pending between the plaintiff and defendant during the hearing of said bill in equity) a requirement that it be allowed to publish these old stories, designating them by name, but concealing the fact that L. C. Page & Company (Inc.) had made secret copies of them, and that The Page Company had these secret copies improperly in its possession * * *. During the negotiations (meaning negotiations between this plaintiff and this defendant), The Page Company assured the plaintiff that they had no copies of the said stories, except newspaper clippings, and she believed it. This The Page Company did, well-knowing that it had other copies and could easily produce them, but realizing that if they admitted it the plaintiff, unless she read them, would not sign any agreement allowing The Page Company to publish them, and that if on the other hand she read them, she would not permit The Page Company to publish them at all in the form in which they were * * *. Their plan (meaning the plan of this plaintiff) in brief was 'We will provide that the plaintiff shall go back to Canada, send the stories to us, and then we will publish not the stories which she sends us (except in so far as we wish) but the copies which we have in our safe which she does not know about, and these we will, if we wish, fix over to suit our adroit purposes. These copies in our safe have references in them to 'Anne Shirley,' or we can put some in and claim that they have, and we will expand and enlarge on these and get the book before the public as an 'Anne' book, in spite of the author.' In order to make this program susceptible of modulation to suit their purposes, they (meaning the plaintiff) artfully provided the clause in said contract that they should be allowed to make some slight changes or amendments to the stories which in their opinion would "tend to improve the book," but that no changes should be made bringing "Anne Shirley" into any story where she did not appear either in the story "as originally published or as revised by the author." This they (meaning this plaintiff) thought would give them an opportunity to remold the stories a little and bring in discreet allusions to "Anne Shirley" and help them in their secret plan of outwitting the plaintiff * * *. Early in the year 1920, The Page Company began to spring the trap which it had so carefully prepared for the plaintiff, writing her that they had been so fortunate as to discover in their safe her "original revisions" of 1912, and that they were going to publish in part not the stories as sent by the plaintiff to them in 1919, but instead the

manuscripts in their safe, meaning the crude copies which they had fraudulently made back in 1912." * * *

And the plaintiff says that all the foregoing alleged libellous statements were irrelevant to the issues raised by said bill in equity brought against this plaintiff and another by this defendant, and unnecessary to the obtaining of the relief thereby sought, and were made by the plaintiff deliberately and with full information
11 and knowledge that they were false, and for the purpose of injuring the plaintiff's reputation, to the great damage of the plaintiff.

THE PAGE COMPANY,
By Its Attorney, ASA P. FRENCH.

At the same term, to wit, October 2, 1920, the following Plea in Abatement was filed by consent:

Plea in Abatement.

(Filed October 2, 1920.)

Now comes the defendant and, without waiving her special appearance but relying thereon, and without submitting herself to the jurisdiction of the court, says that she ought not to be held to answer or proceed further in this suit for the following reason:

That she is a resident and citizen of Leaksdale, Ontario, in the Dominion of Canada, and came into this Commonwealth solely for the purpose of testifying in the case of L. M. Montgomery Macdonald v. The Page Company, pending in the Superior Court for Suffolk County, Massachusetts, in equity, in which case she was the plaintiff and a witness, that her stay in this Commonwealth was solely for the purpose of attending and testifying in said case, and that the alleged service in the suit at bar was made upon her immediately on her leaving the court house at Pemberton Square, Boston, Massachusetts, after a hearing at said court house in said case before a master appointed by said Superior Court. This defendant says that she was entitled to immunity from service of process while in attendance at the hearing in said case pending in the Superior Court of Suffolk County, and in going to and coming from the place of hearing, and that service upon her in the action at bar by The Page Company was illegal and void, and that this suit should be abated.

By Her Attorney, WELD A. ROLLINS,
Appearing Specially.

Then personally appeared the above named Weld A. Rollins and made oath that the facts alleged in the foregoing plea in abatement are true, before me.

GEORGE A. TUCKER,
Notary Public.

12 I, Welt A. Rollins, attorney for the defendant, appearing specially certify that the above plea is interposed in good faith and not for the purpose of delay.

WELD A. ROLLINS.

This cause was thence continued from term to term to the March Term, A. D. 1921, when, to wit, May 10, 1921, the following Agreed Statement of Facts was filed:

Agreed Statement of Facts for Use in Hearing on Plea in Abatement.

(Filed May 10, 1921.)

It is agreed that the plaintiff is, and at the times hereinafter mentioned was, a Massachusetts corporation having its usual place of business in Boston, Massachusetts, and that the defendant, the said Lucy M. Montgomery Macdonald, is, and at the times hereinafter mentioned was a resident and citizen of Leaskdale, Ontario, in the Dominion of Canada; that at the time service of the summons in this case was made on her she had come to and was in the Commonwealth of Massachusetts solely for the purpose of testifying in the case of L. M. Montgomery Macdonald v. The Page Company et al., which case she had instituted as plaintiff against The Page Company and another as defendants in the Superior Court for Suffolk County, Massachusetts; that she was served with the summons in this case of The Page Company against her in Pemberton Square, Boston, immediately after leaving the Court House in Pemberton Square where she had that day been testifying as a witness in the said case of Macdonald v. The Page Company et al. in the Superior Court; that at this time her testimony had not been completely taken and that she continued to give evidence on subsequent days; that she returned to Canada before the hearings were over, having spent no more time in Massachusetts than was necessary for the purpose of attending the trial of said case of Macdonald v. The Page Company et al., which case she actually attended.

Said case of Macdonald v. The Page Company is the same case as that referred to in the plaintiff's declaration in this case as the suit in equity of L. M. Montgomery Macdonald v. The Page Company and the C. H. Simonds Company.

13 The Court may draw inferences of fact.

ASA P. FRENCH,
Attorney for the Plantiff.
WELD A. ROLLINS,
Attorney for the Defendant,
Appearing Specially Only.

At the same term, to wit, May 23, 1921, this cause came on to be heard on the plea in abatement and was thence continued by the court, under advisement, to the June Term, A. D. 1921, when, to wit, August 9, 1921, a memorandum of Decision was filed, ad-

judging plea in abatement good and ordering action abated accordingly.

On the twelfth day of said August, the following Claim of Exception was filed by plaintiff:

Plaintiff's Claim of Exception.

(Filed August 12, 1921.)

Now comes the plaintiff in the above entitled cause, within three days after the receipt of notice of the Memorandum of Decision therein filed, and claims an exception to the ruling of this Honorable Court, in substance, that upon the Agreed Facts the writ herein must be abated.

THE PAGE COMPANY,
By Its Attorney, ASA P. FRENCH.

This cause was thence continued from term to term to the present December Term, A. D. 1921, when, to wit, December 22, 1921, a motion for judgment was filed by defendant.

14 On the twenty eighth day of December, the following Motion for Allowance of Exception is filed and allowed:

Plaintiff's Motion for Allowance of Exception.

(Filed December 28, 1921.)

Now comes the plaintiff and moves this Honorable Court that its exception, claimed August 12, 1921, to the ruling of the Court, in substance that, upon the Agreed Facts, its writ must be abated, be allowed.

By Its Attorney, ASA P. FRENCH.

28 December, 1921.

If I have power to allow the foregoing exception I hereby do so.
J. M. MORTON, JR.,
U. S. Dist. Judge.

Thereupon, to wit, December 28, 1921, the following Judgment is entered:

Judgment.

December 28, 1921.

And now, to wit, December 28, 1921, it is considered by the Court that The Page Company, plaintiff, take nothing by its said writ and that the said Lucy Maud Montgomery Macdonald, otherwise called defendant, recover of the said plaintiff her costs of suit taxed at —

15 *Memorandum of Decision on Plea in Abatement.*

August 9, 1921.

MORTON, *J.*:

The facts on which this plea is grounded are not in dispute: Mrs. Macdonald brought a suit in equity against the Page Company in the State Court. The Page Company, claiming that certain statements made by her in the bill were libelous and actionable, brought the present action at law against Mrs. Macdonald in this court; and service was made upon her while she was in the District "in attendance before a Special Master appointed by the Superior Court to hear the parties and their evidence" (plaintiff's brief) in the other case. She has pleaded in abatement of this action that she was immune from service while within the District for the purpose stated.

On these facts I find and rule that the plea is good and that the action must be abated. Stewart v. Ramsay, 242 U. S. 128; Larned v. Griffin, 12 F. R. 590; Diamond v. Earle, 217 Mass. 499.

So ordered.

Plaintiff's Petition for Writ of Error.

(Filed February 11, 1922.)

Now comes The Page Company, the plaintiff in the above entitled cause, and being aggrieved by the final judgment of this court, entered against it and in favor of the defendant on the twenty eighth day of December, 1921, prays that a writ of error may be allowed to it from the Supreme Court of the United States to said District Court of the United States for the District of Massachusetts, raising the question of jurisdiction alone, and that said question be duly certified by this Honorable Court to said Supreme Court for its decision; and in connection with this petition the plaintiff herewith presents its assignment of errors.

THE PAGE COMPANY,
By Its Attorney, ASA P. FRENCH.

Petition for Writ of Error allowed. Feb. 13, 1922.

J. M. MORTON, JR.,
U. S. District Judge.

16 *Plaintiff's Assignment of Errors.*

(Filed February 11, 1922.)

Now comes The Page Company, the plaintiff in the above entitled cause, and in connection with its petition for a writ of error says that, in the record, proceedings and in the final judgment aforesaid, manifest error has intervened to the prejudice of the appellant, to wit:

1. The Court erred in ruling that the defendant's plea in abatement is good, and that this action must be abated.

2. The Court erred in refusing to overrule the defendant's plea in abatement.

3. The Court erred in ruling, in substance, that the service of the plaintiff's writ upon the defendant was invalid, and that this Court has therefore acquired no jurisdiction of said action.

ASA P. FRENCH,
Attorney for Plaintiff.

Certificate of Jurisdictional Question.

(Filed March 18, 1922, as of February 11, 1922.)

I, James M. Morton, Jr., Judge of the District Court of the United States for the District of Massachusetts, hereby certify that the only issue raised in said cause and passed upon by this court was the question of the jurisdiction of this court as shown by the pleadings and the Agreed Statement of Facts, and is, briefly stated, as follows:

The defendant who is a citizen and resident of a foreign country came into Massachusetts for the sole purpose of attending the trial of, and testifying in, a suit in equity brought by her in the Superior Court of that state against this plaintiff, a corporation organized under the laws of Massachusetts and a citizen and resident thereof and another resident co-defendant. While in the state for that purpose she was served with a writ of this court in the present action brought against her by this plaintiff for an alleged false and malicious libel alleged to have been published by her in the bill in equity by which her said suit was instituted, and to testify in
17 which she came into Massachusetts, as aforesaid. Said service was made upon her immediately after she left the courthouse where she had just been testifying in her said suit, but had not completed her testimony. Upon these facts, has this court jurisdiction of this action by virtue of its writ so served as aforesaid?

This certificate is made conformably to Section 238 of the Judicial Code, and the opinion filed herein will be certified and sent up as a part of the proceedings.

JAMES M. MORTON, Jr.,
United States District Judge.

Bond on Appeal.

(Filed Feb. 11, 1922; Approved Feb. 13, 1922.)

Know all men by these presents that we, The Page Company, a corporation duly organized by law, and having its principal place of business in Boston, Massachusetts, as principal, and Fidelity and Deposit Company of Maryland, a corporation duly organized under

the laws of the State of Maryland, and having a usual place of business in Boston, Massachusetts, as surety, are holden and stand firmly bound unto Lucy M. Montgomery Macdonald, of Leaskdale in the Province of Ontario, and Dominion of Canada, in the sum of two hundred and fifty (250) dollars, to be paid to her and her executors or administrators; to which payment well and truly to be made we bind ourselves jointly and severally, and our successors, by these presents.

Witness our corporate signatures and seals this tenth day of February, 1922.

18 The condition of this obligation is such that—

Whereas the above named The Page Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment of the District Court for the District of Massachusetts in the above entitled cause.

Now, therefore, if the above named The Page Company shall prosecute its said appeal to effect, and shall answer all costs if it fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

THE PAGE COMPANY,
By LOUIS C. PAGE, [SEAL.]
Pres.
GEORGE A. PAGE,
Treas.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By ROGER H. LEVY, *Resident Vice-President.* [SEAL.]

Attest:
JOHN H. LANDER,
Resident Assistant Secretary.

Approved:
J. M. MORTON, JR.,
U. S. District Judge.

19 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Lucy Maud Montgomery Macdonald, otherwise called Lucy Maud Macdonald, otherwise called L. M. Montgomery, a resident of the Province of Ottawa in the Dominion of Canada and a British subject now commorant in the District of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the* fifteenth day of March next, pursuant to a Writ of Error filed in the Clerk's Office of the† District Court of the United States for the

*Not exceeding 30 days from the day of signing.
†Name of Court to which Writ of Error is directed.

District of Massachusetts wherein The Page Company, a corporation organized and existing under the laws of the Commonwealth of Massachusetts, having its principal place of business in Boston, in said Commonwealth, and a resident and citizen thereof, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James M. Morton, Jr., Judge of the District Court of the United States for the District of Massachusetts this thirteenth day of February, in the year of our Lord one thousand nine hundred and twenty-two.

JAMES M. MORTON, JR.,
U. S. District Judge.

20 *Officer's Return of Service of Citation on Writ of Error.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

Boston, February 17, 1922.

I hereby certify that on the 17th day of February, 1922, I served the within citation by giving in hand to Weld A. Rollins, Attorney of Record for the said Lucy Maud Montgomery Macdonald, at Boston in said District, at 4 P. M. a true and attested copy of the within Writ.

WILLIAM J. KEVILLE,
United States Marshal,
By JOSEPH J. QUINN,
Deputy.

Service.....	2.00
Travel.....	.06
	2.06

Marshal's No. 1306.

21 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing are true copies of the papers agreed upon by the parties as constituting the Record upon the Return of the Writ of Error in the cause entitled No. 1333, Law Docket, The Page Company, Plaintiff, v. Lucy Maud Montgomery Macdonald, Defendant, in said District Court determined, together with the original Citation on Writ of Error, with the Marshal's Return of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this eighteenth day of March, A. D. 1922.

[Seal of the United States District Court, Massachusetts.]

JAMES S. ALLEN,
Clerk.

Endorsed on cover: File No. 28,776. Massachusetts D. C. U. S. Term No. 308. The Page Company, plaintiff in error, vs. Lucy Maud Montgomery Macdonald, &c., a resident of the province of Ottawa in the Dominion of Canada and a British subject now commorant in the district of Massachusetts. Filed March 22nd, 1922. File No. 28,776.

No. 368.

Supreme Court of the United States.

OCTOBER TERM, 1922.

THE PAGE COMPANY,
PLAINTIFF, PLAINTIFF IN ERROR,
v.
LUCY M. MONTGOMERY MACDONALD,
DEFENDANT, DEFENDANT IN ERROR.

WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

ASA P. FRENCH,
Attorney for Plaintiff in Error.

ADDISON C. GUTCHESS & SON, LAW PRINTERS, BOSTON.

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 308.

THE PAGE COMPANY,
PLAINTIFF, PLAINTIFF IN ERROR,
v.
LUCY M. MONTGOMERY MACDONALD,
DEFENDANT, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an action of tort for libel. The issue raised by the writ of error is solely that of the jurisdiction of the court below (Record, p. 10; Judicial Code, § 238). More specifically, it is whether or not upon the pleadings and agreed facts the defendant was immune from the service of process under the writ by which the action was begun.

The question is certified as follows (Record, p. 10):

> "The defendant who is a citizen and resident of a foreign country, came into Massachusetts for the sole purpose of attending the trial of, and testifying in, a suit in equity brought by her in the Superior Court of that state against this plaintiff,

a corporation organized under the laws of Massachusetts and a citizen and resident thereof, and another resident co-defendant. While in the state for that purpose she was served with a writ of this court in the present action brought against her by this plaintiff for an alleged false and malicious libel alleged to have been published by her in the bill in equity by which her said suit was instituted, and to testify in which she came into Massachusetts, as aforesaid. Said service was made upon her immediately after she left the court-house where she had just been testifying in her said suit, but had not completed her testimony. Upon these facts, has this court jurisdiction of this action by virtue of its writ so served as aforesaid?"

The facts are, briefly, that the defendant, who is an author and a resident of Leaskdale in the Dominion of Canada, taking advantage of the privilege afforded her by the Commonwealth of Massachusetts to resort to its forum for the purpose of prosecuting a claim against one of its citizens, sued this plaintiff, a publisher, in the Superior Court for Suffolk County in that Commonwealth, and used the court as a medium for the publication, in her bill of complaint, of what must be assumed, for the purposes of this argument, to be false, malicious, and libellous statements concerning the plaintiff, which caused great damage to its business, and are the basis of this suit.

In due course, after issue joined, the case was set down for hearing. The defendant, Mrs. Macdonald, thereupon came into Massachusetts without a writ of

protection (which is probably immaterial) and attended several days before a special master in the County Court House at Boston, in the twofold capacity of a party to the suit and a witness in her own behalf.

At the close of one of these hearings, and shortly after she had left the court house, a deputy United States marshal served her with process in the present suit. Upon the entry of the case in the District Court she filed a plea in abatement asking that the writ be quashed on the ground, in substance, that she had come into Massachusetts for the sole purpose of prosecuting, and testifying in, her said suit in the state court.

The court below sustained the plea in abatement, citing *Stewart* v. *Ramsay*, 242 U.S. 128; *Larned* v. *Griffin*, 12 Fed. 590; *Diamond* v. *Earle*, 217 Mass. 499, and declined jurisdiction upon the ground that the service of the writ was invalid. The plaintiff duly excepted, and thereafter sued out this writ of error.

Errors Assigned and Relied Upon.

The specific errors assigned are as follows (Record, p. 10):

1. The Court erred in ruling that the defendant's plea in abatement is good, and that this action must be abated.

2. The Court erred in refusing to overrule the defendant's plea in abatement.

3. The Court erred in ruling, in substance, that the service of the plaintiff's writ upon the defendant was invalid, and that this (District) Court has therefore acquired no jurisdiction of said action.

The Page Company urged upon the court below, and contends here—

1. (*a*) That the policy of the law granting immunity from the service of process to non-resident parties and witnesses attending and going to and from court is applicable only to the process of that court, or of another in the same jurisdiction, and does not render invalid the service of the process of the United States Court for Massachusetts upon a non-resident sojourning in that state for the sole purpose of prosecuting, or testifying in, a suit pending in the state court; or, more concisely—

(*b*) That a non-resident attending court as a party or witness in the jurisdiction of one sovereignty is not protected while so doing from service of the process of a court exercising jurisdiction under a different sovereignty;

2. That, independently of the soundness or unsoundness of the foregoing proposition, this defendant nevertheless forfeited the right to claim and obtain immunity by using the state court as an instrumentality for the publication of a deliberate and malicious libel concerning this plaintiff as to matters not material to any issue raised by the bill in her suit (Record, p. 6, top); and—

3. That it is not contemplated that the prerogative of a court to afford protection to non-resident witnesses and parties in a suit before it, shall be exerted to protect a party plaintiff in such suit from the service of process in an action brought against him by the party defendant, the cause of which grew out of the first suit and occurred and continued while the first suit was in progress, as in the case at bar.

ARGUMENT.

It was definitively settled by the Supreme Court of Massachusetts in *Diamond* v. *Earle*, 217 Mass. 499, decided in 1914, and by this Court, in *Stewart* v. *Ramsay*, 242 U.S. 128, decided in 1916 (independently of the Massachusetts case, to which the attention of this Court was apparently not directed), that suitors as well as witnesses while in attendance upon court in a foreign jurisdiction and while going to and returning therefrom can invoke immunity from the service of the judicial process of that court, or of a court deriving jurisdiction from the same sovereign power. See, also, 6 Dane's Abridgment, 372 (c. 186, art. 17, §§ 1 and 2).

In neither *Stewart* v. *Ramsay* nor *Diamond* v. *Earle*, *supra*, however, were possible exceptions, such as those suggested in *Central Railway Co.* v. *Jackson*, 238 Fed. 625, 626, 627, formulated or discussed. In neither is the question raised whether or not immunity from the judicial process of a different sovereignty can be claimed and sustained.

In *Diamond* v. *Earle*, both courts were exercising jurisdiction conferred by the same sovereignty, as they were also in *Stewart* v. *Ramsay*.

In *Stewart* v. *Ramsay*, this Court, by *Pitney*, J., quoting with approval from *Parker* v. *Hotchkiss*, 1 Wall. Jr., 269, says: "The privilege which is asserted here is the privilege of the court rather than of the defendant." In *Diamond* v. *Earle*, the Massachusetts court, by *Rugg*, C.J., describes it as "not *merely* a privilege of the person; it is [also] a *prerogative* exerted by the sovereign power through the courts for the furtherance of the ends of justice." The difference in definition is slight, and may have no material

bearing upon the case at bar. It is respectfully submitted, however, that Chief Justice Rugg's statement is the more complete, and that, while it is true that the privilege, or, more correctly, the prerogative, is that of the court, it is, as well, the privilege of the person; particularly so in the case of a party plaintiff who is allowed to come into a foreign jurisdiction and there to seek and obtain the assistance of its tribunals in the enforcement of a claim against one of its citizens. It is immunity given such a suitor to protect him in the enjoyment and proper exercise of this privilege, and the immunity granted is from the service of process issuing out of the court whose jurisdiction he is invoking, or another court in the same jurisdiction. That state courts have authority in such circumstances to protect a witness or a suitor from the process of a federal court, or that a federal court is bound, and is bound under all circumstances, to protect a suitor or witness in such a situation from being summoned into its forum, has never yet received the sanction of this Court. It would seem clear, however, that such a privilege should not be successfully invoked if the person claiming it has abused it, or has violated the sanctity of the asylum in which he has sought refuge.

I.

A non-resident, attending court as a party or witness in the jurisdiction of one sovereignty, is not protected while so doing from service of the process of a court exercising jurisdiction under a different sovereignty.

It was so held by *Carpenter*, J., in 1893, sitting in the Circuit Court of the United States for Massachu-

setts, in the case of *Holyoke &c. Ice Co.* v. *Ambden*, 55 Fed. 593, 595. Ambden, who was a resident of Vermont, was served in Massachusetts, with process from a Massachusetts court, while he was on his way from Vermont to attend court in Connecticut as a witness. He removed the case to the United States Circuit Court and pleaded in abatement that the service was invalid. Referring to authorities cited in the opinion, the Court says:

> "In none of them, however, has it been held that a party or witness is exempt from service in any other jurisdiction than that in which his attendance as a party, or as a witness is required. I cannot see any reason for further extending this rule. It is established by courts to protect their own process and their own suitors, by the assurance that the court in which the party has brought his action or into which he has been summoned, or into which the witness has been summoned, will not permit its own process, or that of other courts in the same jurisdiction, in another action, to embarrass the proceedings. It seems to me that evils greater than these sought to be remedied would arise if the courts of one state should assume so to guard and protect all the other courts in the country. The rule is in derogation of common right, and restrains the plaintiff from suing, lest a greater evil may arise than that involved in the temporary suspension of his right to bring his demand into a court of justice having jurisdiction to determine it. The rule, therefore, ought to be extended with great caution; and to extend it

beyond the jurisdiction immediately concerned seems to me to be unnecessary and mischievous."

It is submitted that the protection extended to the individual under this prerogative of the court must be from the same source, and co-extensive with that afforded by a writ of protection. Such a writ, however, is issuable only by the court upon which the suitor or witness is in attendance, is addressed to the proper judicial or executive officers over which that court has authority, and its mandate cannot extend to similar officers in a foreign jurisdiction. The federal court in Massachusetts is just as much a foreign jurisdiction with respect to the courts of that commonwealth as are the courts of Massachusetts to those of any other state of the Union or of Canada; and the United States Circuit Court for Massachusetts, in the case last cited, was under no different obligations of right or courtesy to the Connecticut state courts than is the United States District Court to the Superior Court of Massachusetts in the case at bar. *Robb v. Connolly*, 111 U.S. 624, 631.

II.

The defendant forfeited the right to claim and obtain immunity from the service here questioned by using the state court as a medium for the publication of a deliberate and malicious libel concerning this plaintiff as to matters not material to any issue raised by the bill in her suit against this plaintiff, to testify in which she came to Massachusetts.

As has already been pointed out, the defendant in this action began her suit against the plaintiff by a

bill of complaint in which she incorporated and published in Massachusetts what must be assumed, for the purpose of this argument, to be a malicious libel resulting in great damage to the plaintiff. That libel was a continuing tort, potentially and actually working injury to the plaintiff down to and at the moment of the service upon the defendant of the process in this suit. If this writ is quashed, the Page Company must either abandon its claim against her or must go into Canada to obtain redress for an injury inflicted upon it by the plaintiff while in Massachusetts in attendance upon a court in that state. The situation is, to all intents and purposes, the same that would exist if an alien non-resident plaintiff, coming into a state court having jurisdiction of the parties for the trial of his case, were to commit, in the court room or court house, an unprovoked assault of a seriously disabling character upon the defendant in that suit, and should then insist upon being allowed to depart unimpeded to his home, perhaps in some remote corner of the globe, and compel his victim to follow him there for redress. The rule in *Stewart* v. *Ramsay* should be modified, it is urged, to such an extent as to make it impossible for a non-resident plaintiff to violate the hospitality of the forum, or the sanctity of the asylum whose protection he is seeking, and nevertheless to demand and receive that immunity from the consequences of such violation which the rule as interpreted by the defendant and applied by the District Court in the case at bar contemplates.

The relation of the Massachusetts court to this defendant at the time of service upon her was to all intents and purposes that of a sanctuary where she had

taken refuge and in which, while seeking and enjoying its protection, she had violated the implied terms of that protection by committing an actionable wrong against the plaintiff. This being the situation, it is difficult to understand how she can successfully demand from that court, or from the District Court of Massachusetts, the immunity which she now claims. It *ought* to be true that to make use of the files of a judicial tribunal for the publication of a libel is an act which would work a forfeiture of the security which that tribunal would otherwise insure to a non-resident suitor.

In order to prevail in this proceeding, the defendant must satisfy the Court of the truth of the following proposition:

That a person attending upon court, whether as witness or suitor—and if suitor, whether as plaintiff or defendant—in any jurisdiction in which he does not reside, and while going to and returning therefrom, is immune from the civil process of any other court, whether that court derives its powers from the same sovereignty as the court of attendance, or from a different or foreign sovereignty; and to this rule there are no exceptions.

If this be the rule, plaintiff's counsel will at least have been instrumental in the formulation of a clear and comprehensive proposition of law which has never hitherto been laid down by the highest tribunal in the land, and which will set at rest for all time a question the answer to which has heretofore been enveloped in doubt. If it is a true statement of the law, it will, of course, bear successfully the test of application to various conceivable circumstances. It is to be borne

in mind that the pertinent queries are: (1) Does the protection under discussion render its beneficiary immune from the service of process issuing out of a court in a jurisdiction foreign to that of the court of attendance? (2) Is there nothing which a person, in the classes entitled to the protection claimed, can do after it has attached, whereby it will be forfeited? and also: (3) How far, if at all, should and does the principle of comity enter into the situation?

It is elementary, of course, that the state jurisdiction of Maine, for example, is foreign to the state jurisdiction of California, in the same sense and to the same degree as it is to the jurisdiction of Nova Scotia or of Australia. The courts of Massachusetts are foreign jurisdictions with respect to the courts of Rhode Island, and, in the same sense, all the state courts of the Union are foreign jurisdictions with respect to the United States Courts. *Robb* v. *Connolly, supra.* If the defendant's contention as to the rule is correct, therefore, a person resident in Hawaii and traveling through California to attend the trial of a suit begun by him in a state court in Maine could not be effectively served in California, while on his way through that state, with process from a California state court; and the same would be true of any intervening state through which he might pass on his way to the Atlantic coast. So, too, a person traveling from Massachusetts to testify in a suit pending in Nova Scotia could not be properly served in Maine with process issuing from a court of that state, nor could he be so harassed by Massachusetts process if he were traveling to Boston, there to take a trans-atlantic steamer in order to testify in London.

If the immunity is put upon the ground that it is a fundamental principle in the administration of justice, or upon the doctrine of comity, there is just as much reason for applying it as between Maine and Nova Scotia as between Maine and California.

2. It can hardly be doubted that the protection of a sanctuary would be withdrawn as the result of an act of sacrilege on the part of a refugee, and the analogy to the situation at bar, as has already been suggested, is close. So, too, upon generally accepted principles of justice, it would seem that an assault through the medium of court pleadings inflicted by one party to a suit upon the reputation of the other party thereto, or a personal injury inflicted by one upon the other in or about the court house during the trial of the case, should give the party upon whom, or upon whose reputation, the assault was made the right to bring a suit against the other in the jurisdiction in which the trial is proceeding.

In *Central Railway Signal Co.* v. *Jackson*, 238 Fed. 625, *supra*, Judge Dickinson, at pages 626 and 627, indicates the following exceptions to the rule:

> "Service may, however, be made in a state through which the party served is traveling although going to attend a trial. Service may be had for a cause of action arising out of an act of the party served while within the jurisdiction in which served. . . .
>
> "The exception to the rule of immunity is limited by the federal courts to liability to service in an action the cause of which arose while the defendant was in the foreign jurisdiction, and does

not include a cause of action which is related to the proceeding which brought the defendant within the jurisdiction. . . ." (p. 626, bottom).

"One is afforded by those which rule that the party served cannot claim immunity from process issued to right a wrong which the defendant has done while within the jurisdiction in which served, because this would be unjust to the plaintiff" (p. 627, bottom). See also *Nichols* v. *Horton*, 14 Fed. 327, 330-3

In this connection attention should be called again to the fact that the libel charged in the case at bar, though signed and sworn to by Mrs. Macdonald in Canada, was not published until filed by her, or by her attorney acting for her, in Massachusetts; and that the wrong thereby alleged to have been done to the plaintiff continued upon the records of the court down to and including the time when the service which she now asks to have set aside was made upon her.

3. In some cases the refusal of one court to permit its process to be effectively served upon a witness or suitor in another jurisdiction is put upon the vague ground of comity as between courts. This suggestion has already been discussed in this brief in an illustrative way. Its application seems to the defendant to lead to some absurdity. In the case at bar the ruling of the District Court is not expressly put upon that ground. Assuming, however, that it is to be implied, what is the situation? Except for the application of the rule for which the defendant is here contending, the plaintiff, upon finding Mrs. Macdonald in Massachusetts, would have the right under the statutes of the United States to bring suit against her in the Mas-

sachusetts federal court. The question is hazarded whether comity between courts in different jurisdictions can go so far as to deprive a citizen of such a right. A court may justly protect its administration of the law by refusing to permit *its own process* to be used to deter parties or witnesses from free access to its justice, but it is going very far to assert that it has a right to expect every other court in the United States to connive with it to that end, and thus abridge the rights of citizens in other jurisdictions. This is the consideration which prompted Judge Carpenter, in the paragraph quoted in full *supra*, to observe that—

> "The rule is a derogation of common right and . . . therefore ought to be extended with great caution; and to extend it beyond the jurisdiction immediately concerned, seems to me unnecessary and mischievous."

And how shall "comity" be applied as between jurisdictions such as Connecticut or Rhode Island, where the rule does not extend to suitors, and Massachusetts, for example, where it does?

> *Bishop* v. *Vose*, 27 Conn. 1, 11;
> *Baldwin* v. *Emerson*, 16 R.I. 304;
> cited in *Stewart* v. *Ramsay*, *supra*.
> *Diamond* v. *Earle*, *supra*.

It is one attribute of "comity" that, in the field in which it operates, it must be universal and reciprocal.

III.

The right of a corporation to maintain an action for libel is well settled.

"A corporation may sue for a libel which reflects upon the management of its business and property, and which necessarily affects its credit and directly occasions pecuniary injury. Such a libel is actionable *per se*."

Puget Sound Co. v. *Carter*, 233 Fed. 832.
Reporters' Ass'n v. *Sun*, 186 N.Y. 437.
Coal Land Development Co. v. *Chidester*, 86 W. Va. 561.
Hapgoods v. *Crawford*, 125 App. Div. 856.

IV.

That a libel may be published in judicial pleadings when the alleged libellous statements are not pertinent and material to the issue between the parties is established, at least in Massachusetts.

McLaughlin v. *Cowley*, 127 Mass. 316.
Same v. *Same*, 131 Mass. 70.
Barnet v. *Loud*, 226 Mass. 447.

It is respectfully submitted that the judgment of the District Court should be reversed.

ASA P. FRENCH,
Attorney for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1922

[No. 308.]

THE PAGE COMPANY, PLAINTIFF IN ERROR
Plaintiff,

v.

LUCY MAUD MONTGOMERY MACDONALD, ETC., DEFENDANT IN ERROR,
Defendant.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR DEFENDANT IN ERROR

WELD A. ROLLINS,
Attorney for the Defendant in Error appearing specially.

PRESS OF GEO. H. ELLIS CO. (INC.) BOSTON

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LUCY MAUD MONTGOMERY MACDONALD, ETC., DEFENDANT IN ERROR, *Defendant*.

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BRIEF FOR DEFENDANT IN ERROR

SHORT STATEMENT OF THE CASE

The case presents merely this question:

Whether a citizen and resident of Canada who comes to Massachusetts solely to attend the trial of a suit in equity which she has brought in the Massachusetts State Court, and in which she is a witness, can be lawfully served with civil process in an action of tort brought by one of the defendants against her in the District Court of the United States for the District of Massachusetts, service being made as she is leaving the court house before the conclusion of her testimony.

The facts are set out in the agreed statement of facts on page 7 of the Record. The defendant appeared specially and filed a plea in abatement, which was sustained by the District Court, whereupon the plaintiff sued out a writ of error.

ARGUMENT AND AUTHORITIES

I

THE DEFENDANT WAS PRIVILEGED FROM THE SERVICE OF PROCESS

That a non-resident plaintiff coming into Massachusetts for the purpose of attending the trial of and testifying in his case is exempt from the service of process, is settled by the decisions both in the Massachusetts Supreme Court and the United States Supreme Court.

Diamond v. *Earle*, 217 Mass. 199, the Court saying:

> "The rule has been stated generally that suitors and witnesses from a foreign jurisdiction are exempt from service on civil process while attending court and for such reasonable time before and after as may enable them to come from and return to their homes. This statement is broad enough to include the parties plaintiff as well as defendants and witnesses."

Stewart v. *Ramsay*, 242 U. S. 128, where the Court says:

> "The true rule, well founded in reason and sustained by the greater weight of authority, is, that suitors, as well as witnesses, coming from another State or jurisdiction, are exempt from the service of civil process while in attendance upon court, and during a reasonable time in coming and going."

The same result was also reached by Judge Colt in the Circuit Court, District of Massachusetts, in the case of *Larned* v. *Griffin*, 12 Fed. 590.

For a general survey of the law upon this subject in jurisdictions at large, see:

32 Cyc., p. 492.
25 L. R. A. 721, note.
42 L. R. A., N. S., p. 1101, note.
1915 A—L. R. A., p. 694, note.
42 Central L. J. 398.

It is submitted that the question involved in this case is settled by authority. The remainder of this brief is added merely to meet any discriminations which the plaintiff may seek to make.

II

REASONS FOR THE RULE

The reasons for the rule are that it is the policy of the law to prevent an act which will deter persons from coming into the jurisdiction to attend court, or give witnesses or suitors a feeling of insecurity, or distract their minds from the litigation in hand. The policy of the law is to encourage their coming and freely giving their evidence.

This privilege of parties and witnesses is alike the privilege of the Court and the individual and the public. It protects the Court from interruption and delay, takes away the inducement to disobey process, enables the citizen to prosecute his rights without molestation, and procures the attendance of all who are necessary for their defence or support.

25 L. R. A. 721, 723.

III

THE RULE IS GIVEN A BROAD AND LIBERAL CONSTRUCTION, AND THE IMMUNITY IS ABSOLUTE

The immunity *eundo, morando et redeundo*, as the phrase is, is held to be absolute. A party if arrested will be discharged absolutely.

25 L. R. A. 723.
Larned v. *Griffin*, 12 Fed. 590.

The need of having the rule absolute is coextensive with the need of the rule. If it were subject to discriminations and exceptions, it would be common practice to serve on such nonresidents, and they would thereupon become involved in enough litigation as to whether they were exempt or not to defeat the purpose of the rule. It might often be nearly as difficult and expensive to litigate the question of exemption as the merits of the case, and the lay mind would not be satisfied to come from a foreign jurisdiction with so imperfect a protection.

Central Ry. Signal Co. v. *Jackson*, 254 Fed. 103.

The exemption from arrest on mesne process is no broader than the exemption from service of a summons,

United States v. *Zavelo*, 177 Fed. 536;

and unless the rule were absolute, a nonresident might be arrested and involved in litigation as to whether the arrest might be justified by some discrimination. In order to accomplish its purpose, therefore, and reassure the cautious and timid, the rule must be perfectly simple and absolute, and so we find it.

There is no tendency to whittle it away. On the contrary, it is given a liberal construction.

Plimpton v. *Winslow*, 9 Fed. 365.
Roschynialski v. *Hale*, 201 Fed. 1017.

It protects witnesses before a legislative committee, witnesses before a commission of the Supreme Court, a suitor attending a hearing before a referee in bankruptcy, or before a master or examiner in equity proceedings, persons attendant upon summary proceedings for dispossession under a landlord and tenant statute, suitors or witnesses present in the state for the purpose of taking depositions, and a suitor coming into the jurisdiction in order to confer with counsel during the argument of a demurrer.

32 Cyc. 493.
25 L. R. A. 726.

It extends to all legal tribunals.

Wood v. *Neale*, 5 Gray, 538.
Thompson's Case, 122 Mass. 428.

And immunity is secured to all parties, witnesses, law agents and common agents of the parties, bail and officers of corporations.

25 L. R. A. 724.

A nonresident party is not deprived of exemption from service of summons while attending merely an argument of counsel on a matter of law, although his attendance was unnecessary.

Tory v. *Bast*, 3 W. N. C. 63;
Kinne v. *Lant*, 68 Fed. 436;

and he is exempt from arrest under similar circumstances.

Ex parte McNeil, 6 Mass. 245.

The rule covers cases where the parties are reversed, *i.e.*, where the defendant in the first action sues the plaintiff.

Peet v. *Fowler*, 170 Fed. 618.
Read v. *Neff*, 207 Fed. 890.
Henegar v. *Spangler*, 29 Ga. 217.

Stewart v. *Ramsay*, supra, at page 131:

> "'Even parties in interest, whether on the record or not, might be deterred from the rightfully fearless assertion of a claim or the rightfully fearless assertion of a defense, if they were liable to be visited on the instant with writs from the defeated party.'"

The same thought is in the mind of the Court in *Diamond* v. *Earle*, or indeed any case which holds that the plaintiff is exempt from the service of process.

So also in *Roschynialski* v. *Hale*, 201 Fed. 1017.

Nor does it affect the rule that the cause of action in the second suit grows out of the first.

Diamond v. *Earle*, supra.
Peet v. *Fowler*, supra.
Read v. *Neff*, supra.
Stewart v. *Ramsay*, supra.
United States v. *Zavelo*, 177 Fed. 536 (action of malicious prosecution against a witness. Punished for contempt).
Central Ry. Signal Co. v. *Jackson*, 238 Fed. 625, 626, 627.
Kauffman v. *Kennedy*, 25 Fed. 785.

This is plain on reason as well as authority, because the purpose of the rule is to encourage nonresidents to come freely into the jurisdiction whether as witnesses or parties, and this purpose would be defeated if the very doing of that which they came for were the ground of an exception to the rule.

Stewart v. *Ramsay*, supra.

A reference to the original papers in *Diamond* v. *Earle*, supra (Social Law Library, Boston), discloses that that case and the three others mentioned therein all grew out of the same automobile accident. Counsel for the plaintiff argued:

> "Is it good public policy that a nonresident should come into our Courts as a plaintiff, and enforce his rights against one or more of our citizens without at the same time compelling him to do justice to our citizens?"

He also argued that all four cases should be tried together in Massachusetts. But the Court decided against him. This case goes the whole way, holding that a nonresident may come to Massachusetts to try his case for damage to his automobile and cannot be served with process for killing a citizen of Massachusetts in the same accident.

In *Read* v. *Neff*, supra, Neff of Illinois went to Iowa to try a case of fraud against Read in Iowa. While there, he was served with process by Read. The Court says:

> "It is said that this litigation grows out of and is connected with the alleged cause of action presented by Mr. Neff. If this is true, the inquiry suggests itself that a counterclaim could have been presented and one trial would have concluded the differences between the parties."

It would seem in the case at bar that the suit in the state court might conclude the differences between the parties and therefore that the plaintiff's suit was premature and consequently, among other reasons, without merit, and the Court will be reluctant to make this lack of merit the ground of a discrimination in favor of the one bringing such a suit. But the rule does not depend on the merits or lack of merits of the counter suit. The rule laid down by the Supreme Courts of the United States and of Massachusetts is unconditional that the nonresi-

dent plaintiff must not be served on by anybody. The defendant could have obtained a writ of protection before coming into the state. But the writ of protection would not have increased her immunity. It would merely have been a convenient evidence of it.

May v. *Shumway*, 16 Gray, 86.
Thompson's Case, 122 Mass. 428.
Ginn v. *Almy*, 212 Mass. 486, 496.
Larned v. *Griffin*, supra.

It is submitted that it would be an unfortunate exception to the rule if it were held that as soon as a nonresident plaintiff came into the state to try his case the defendant could serve him with a suit for libel on the ground that his declaration or bill in equity alleged things that were not so. Any defendant could sue any plaintiff for this, and the protection afforded by the rule would be illusory. To permit the case at bar to continue would encourage similar proceedings in other cases. Defendants might always gain an improper advantage by serving writs on their opponents and their opponent's witnesses to the manifest disadvantage of the administration of justice.

Stewart v. *Ramsay*, supra.

The rule is an ancient common law rule.

Diamond v. *Earle*, supra;

and is equally enforced in the United States courts and the Massachusetts courts. There is comity between the two, and the United States courts will not allow their process to be directed against litigants before the state court.

Larned v. *Griffin*, supra.
Juneau Bank v. *McSpedan*, 5 Biss. 64. (Relied on by Supreme Court in *Stewart* v. *Ramsay*, supra.)

Feister v. *Hulick*, 228 Fed. 821.
Brooks v. *Farrell*, 4 Fed. 166.
Small v. *Montgomery*, 23 Fed. 707.
Roschynialski v. *Hale*, supra.
Central Ry. Signal Co. v. *Jackson*, 238 Fed. 625.

And *vice versa* the state courts will respect the privilege of the United States courts.

Atchison v. *Morris*, 11 Fed. 582.
Hale v. *Wharton*, 73 Fed. 739 (in which, incidentally, the court says:

"It is, perhaps, not too much to say that no rule of practice is more firmly rooted in the jurisdiction of United States Courts than that of the exemption of persons from the writ of arrest and of summons while attending upon courts of justice, either as witnesses or suitors.")

Hurst's Case, 4 U. S. 386.
Bank v. *Ames*, 39 Minn. 179.
Hollender v. *Hall*, 13 N. Y. Supp. 758.

The rule in question applies to parties and witnesses from a foreign country as well as to residents of other states. This appears from the reason of the rule—*i.e.*, that the administration of justice requires that those who are not amenable to process shall not be deterred from coming voluntarily. It is also settled by authority.

Stewart v. *Ramsay*, supra.
25 L. R. A. 731.
Smith v. *Govt. of Canal Zone*, 249 Fed. 273.
Greenleaf on Evidence, 16th Ed. § 317.
Hollender v. *Hall*, 13 N. Y. Supp. 758.

The rule as uniformly stated lays the emphasis on the *residence* of the person served. It makes no difference where he lives if he is a nonresident.

The plaintiff argued in the Court below that an excep-

tion to the rule should be made in its case because the very thing that it complained of was the allegations in plaintiff's bill in equity. But, if important, it does not appear that the allegations were not true, or that they were in fact libellous. The plaintiff cannot by making averments in its declaration change the rule of immunity. If so, a plaintiff could always defeat the immunity. Moreover, in the Massachusetts District Court the writ precedes the declaration. In this case it preceded it by the interval from June 22, 1920, when the writ was served, to September 15, 1920, when the declaration was entered, a period of nearly three months. During this time it did not appear what the plaintiff's cause of action was except that it was an action of tort. It could make its declaration any tort it chose. But for all this period the defendant was entitled to have the writ quashed. Suppose that a witness were subject to be served with a writ, or with successive writs, during the progress of his testimony, which writs turned out to be the institution of suits for slander; would it not defeat the purpose of the rule? Would it not embarrass the Court in the administration of justice, and deter the witness in freely giving his evidence?

Cf. *Stewart* v. *Ramsay*.

In the Court below the plaintiff also argued that there should be an exception to the rule in its case because there ought not to be a privilege to protect a wrongful act, and gave as an example an assault committed by the one claiming the privilege after coming into the jurisdiction. It may well be that the one claiming the privilege can lose it by improper conduct after he has come into the jurisdiction, but this is not that sort of case. The defendant has not done anything that she ought not to do after coming into Massachusetts, and the most that can be said by the plaintiff is that it claims that before coming into the jurisdiction she caused the bill in equity to be filed

in the state court containing libellous averments. But it is not improper to cause a bill in equity to be filed, and the claim of the plaintiff that it contained libellous allegations is merely a claim by plaintiff not agreed to in the agreed statement of facts, and as a claim it stands no higher than any other claim of wrong that a plaintiff might make. A claim of previous tort within the state does not waive the privilege.

Diamond v. *Earle*, supra.

Even though The Page Company had an execution, thus showing the justness of its claim, it could not cause it to be served by arrest,

Thompson's Case, 122 Mass. 428;

and probably not in any way.

Diamond v. *Earle*, supra.
United States v. *Zavelo*, supra.

In *Central Ry. Signal Co.* v. *Jackson*, 254 Fed. 103, the Court says:

> "If the immunity was sometimes granted and sometimes denied, the practical result would be the same as if no immunity was accorded. To give practical value to the principle, it must therefore be enforced and never denied, unless the case comes within the recognized exceptions. A practical test of the value of the principle is that the exceptions should be clearly enough defined, so that counsel would be able to advise in a given case whether immunity from service would be granted or withheld."

It is submitted that counsel may safely advise a non-resident:

> "You may come to this jurisdiction to attend the trial, if you come solely for the trial, do not stay longer than necessary for the purpose of the trial, do not transact other business, or misconduct yourself while here."

It would seem to be unnecessary for counsel to add:

> "But if your suit or evidence is displeasing to those adversely affected, you will have no immunity from libel or slander suits."
>
> *Stewart* v. *Ramsay*, supra.

As above stated, writs of protection do not enlarge the immunity. They are only evidence of it. Writs of protection are exceedingly simple in form. The commanding part of the writ in use in Massachusetts is as follows:

> "We do therefore prohibit you, and each and every of you, to attach the body of the said A. B. or to serve him with any civil process whatever, while travelling to or from our said Court, or during his attendance there for the trial of the said cause."
>
> Buswell & Walcott, Massachusetts Practice (3d Edition), page 132.

If the plaintiff should prevail in the case at bar, it would seem that writs of protection ought to be amended to allow service of writs in tort by an adverse party. It is believed that an ancient writ which has come down in this simple form ought not to have exceptions added to it. Moreover, it would be difficult to add merely an exception for an action of libel or slander brought by an adverse party because, as above pointed out, a writ does not disclose that it is the institution of an action for libel or slander, but merely discloses that the action is an action of tort.

IV

A PLEA IN ABATEMENT WAS THE PROPER REMEDY OF THE DEFENDANT

Larned v. *Griffin*, 12 Fed. 590 (Mass.).
Diamond v. *Earle*, supra.
Stewart v. *Ramsay*, supra.

V

THE MASSACHUSETTS STATUTE CONCERNING SUBSTITUTED SERVICE ON ABSENT DEFENDANTS DOES NOT DEFEAT THE PRIVILEGE

Revised Laws of Massachusetts, Ch. 170, Sec. 2, *et seq.* have provisions that if a nonresident brings an action in Massachusetts,

> "he shall be held to answer to any action brought against him here by the defendant in the former action, if the demands are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other" and that service may be made on the nonresident's attorney.

This statute has no application to the case at bar. It does not appear that the demands are of such a nature that the judgments, etc., could be set off. In Massachusetts, a suit in equity does not eventuate in a judgment, and the phrase "set off" is a technical one referring to liquidated demands. In addition, the statute cannot apply where one suit is in the state court and the other in the United States court. The clerk or judge of one court cannot direct the clerk or judge of the other to offset judgments. Nor could the executions, if any, be set off. R. L. Ch. 177, Sec. 27. But, however this may be, the plaintiff has not proceeded under this statute. Moreover, the statute does not negative the immunity, as appears from *Diamond* v. *Earle*, supra, nor does it purport to. On the contrary, in a proper case it obviates any need of serving on the nonresident during the trial.

Respectfully submitted,

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